88-1342

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

—o—

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

—o—

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QUESTION PRESENTED

Whether the patent unconstitutionality of a public nuisance statute, as an unlawful prior restraint on pure speech, establishes transparent invalidity and lack of subject matter jurisdiction, as a defense to the collateral bar rule of *Walker v. City of Birmingham*, 388 U.S. 307 (1967), in a criminal contempt action.

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No. .....

In The

Supreme Court of the United States

October Term, 1988

SEQUOIA BOOKS, INC.,[1]

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on July 21, 1988.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at *People v. Sequoia*

[1]There are no parent companies, subsidiaries, or affiliates of the corporation.

Books, Inc., 172 Ill.App.3d 627, 527 N.E.2d 50 (1988). A copy of this opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. Sec. 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District.

A written opinion and order was issued by the Appellate Court on July 21, 1988. Petitioner sought rehearing from the Second District Appellate Court, which was denied on August 20, 1988. A copy of the order denying rehearing is included in the Appendix as Exhibit B. The petitioner sought timely Leave to Appeal to the Illinois Supreme Court, and on December 8, 1988, review was denied. A copy of the order is included in the Appendix as Exhibit C. The petitioner filed an Affidavit of Intent to Seek Review in the United States Supreme Court and a Motion to Stay the Mandate with the Illinois Supreme Court. On January 3, 1989, the motion to stay was granted, and a copy of the Illinois Supreme Court's Order staying the mandate is included in the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States and the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1, *et seq.*, Ill.Rev.Stat. (1987), are set forth in the Appendix as Exhibits E and F.

STATEMENT OF THE CASE

On January 1, 1986, new legislation amending the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1, Ill.Rev.Stat. (1987) became effective. Prior to this amendment, the statute declared as public nuisance the operation of a gambling house, a brothel, or other like activity, all involving violations of provisions of the Illinois Criminal Code. The amendment added a new category of predicate offenses for which abatement orders in the form of injunction and closure orders could be entered by Circuit Courts in Illinois. In pertinent part the statute provides: "Maintaining Public Nuisance. Any building used in the commission of offenses prohibited by Sections . . . 11-20 . . . of the 'Criminal Code of 1961' . . . is a public nuisance." § 37-4 authorizes jurisdiction in Illinois Circuit Courts for an abatement action which can be commenced by the States Attorney of the county in which the alleged nuisance is located. The circuit court is granted jurisdiction to issue exparte orders of injunction without notice or bond. After hearing, the court may issue a further order of a permanent nature, restraining use of the building for one year, including the requirement of posting a bond of up to $5,000 to stay the effect of such an abatement order. As a condition of the bond, no offense specificed under the act may be committed on the property. The Illinois Obscenity Statute, Chapter 38, § 11-20, Ill.Rev.Stat. (1987), one of the new predicate offenses under the Criminal Public Nuisance Act, is included in the Appendix as Exhibit G.

On January 7, 1986, the State's Attorney of Kendall County, Illinois filed a complaint seeking a preliminary

injunction, a permanent injunction and other sanctions against the petitioner, Sequoia Books, Inc. Sequoia Books owns and operates an adult bookstore, The Denmark Bookstore, on U. S. Business 30, in rural Kendall County, near Aurora, Illinois. The complaint alleged *inter alia* that the bookstore was being operated in violation of Chapter 38, Section 37-1 *et seq.*, that petitioner had been convicted on obscenity on prior occasions, and had sold or exhibited obscene materials on its business premises. The owners of the building, Bruce and Cathy Reimenschneider, were also made parties defendant to the civil injunctive case. Subject matter jurisdiction was predicated solely upon the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1 *et seq.* Ill.Rev.Stat. (1985).

On January 21, 1987, Circuit Judge Wilson Burnell, entered a permanent injunction against Sequoia Books which provided:

> "[T]his Court hereby enjoins the Defendant, Sequoia Books, Inc., . . . from maintaining the public nuisance . . . and further expressly enjoins the Defendant, Sequoia Books, Inc., . . . from exhibiting, selling or offering for sale material in the premises . . . in violation of Chapter 38, Section 11-20, Illinois Revised Statutes."

Judge Burnell further stayed enforcement of the injunction pending appeal and upon Sequoia Books posting a $5,000 cash bond. Sequoia Books filed its notice of appeal, posted the bond and continued operation.

At all stages of the trial court proceedings, in pretrial motions, in trial motions and arguments, and in posttrial motions, petitioner maintained the Illinois Criminal Public Nuisance Act was unconstitutional. Petitioner con-

tended the act was infirm, in violation of the First and Fourteenth Amendments to the Constitution of the United States, as an invalid prior restraint, and for failing to meet the constitutional requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965), and recent decisions of the United States Supreme Court.

While the appeal from the permanent injunction was pending, the State of Illinois requested that Petitioner's bond be revoked because Sequoia Books had sold sexually explicit materials alleged to be obscene. Following additional proceedings in the Circuit Court, the State's request was granted, the bond revoked, and the injunction placed in full force and effect, on May 11, 1987.

Petitioner sought a stay of the injunction order from the Second District Appellate Court, the Illinois Supreme Court and eventually from this Court. See *Sequoia Books, Inc. v. Illinois*, June 16, 1987 (No. 86-1987, Justice John Paul Stevens). A copy of this order is included in the Appendix as Exhibit H. In the stay requests, petitioner again asserted the unconstitutionality of the statute, but no stay of the injunction was granted.

In subsequent trial proceedings, a petition for rule to show cause was issued against Sequoia Books by the Kendall County State's Attorney's Office on May 26, 1987. The petition alleged that Sequoia Books had violated the permanent injunction order of January 21, 1987 by offering for sale two magazines, "Leather Sleaze" and "Hard Leather" in its bookstore on May 11, 1987. It was alleged that these magazines were obscene and that therefore, the permanent injunction had been violated. Following a jury trial, Petitioner was found to have violated the per-

manent injunction and adjudged in criminal contempt on June 16, 1987, and was fined $10,000.

Petitioner's timely filed post-trial motion was denied. In that motion and at every stage of the contempt proceeding, petitioner maintained that the Illinois Criminal Public Nuisance Act was violative of the First and Fourteenth Amendments, and further that the permanent injunction issued against it was likewise unconstitutional. Petitioner timely appealed to the Second District Appellate Court.

On January 19, 1988, the Illinois Appellate Court, Second District, issued its opinion in the appeal from the permanent injunction order. In *People v. Sequoia Books, Inc.*, 165 Ill.App.3d 143, 518 N.E.2d 775 (2nd Dist. 1988), (hereinafter referred to as "*Sequoia Books I*"), the court ruled that the Illinois Criminal Public Nuisance Act, as amended, was unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, as an invalid prior restraint. A copy of the opinion is included in the Appendix as Exhibit I. The State of Illinois sought review by the Illinois Supreme Court and that review was granted. The cause in which the Illinois Criminal Public Nuisance Act was held unconstitutional has been briefed and argued in the Illinois Supreme Court and is awaiting decision. *People v. Sequoia Books, Inc.* (No. 66503, Argued June 9, 1988).

While these appeals were pending, another petition for rule to show cause was filed and directed against Sequoia Books and following a jury trial, petitioner was again found in contempt of court for being in violation of the permanent injunction and a $20,000 fine was imposed. In addition, the trial court entered a closure order

and the bookstore was padlocked. Sequoia Books sought emergency relief from the Second District Appellate Court, the Illinois Supreme Court and again this court. (See *Sequoia Books, Inc. v. Illinois*, No. 87-1646, Justice John Paul Stevens). A copy of this order is included in the Appendix as Exhibit J. All requests for emergency relief in the form of the stay of the closure order were denied, and all requests again asserted the unconstitutionality of the statute.

On July 21, 1988 the Second District Appellate Court issued its opinion in this case. (This opinion will hereinafter be referred to as "*Sequoia Books II*".) The court rejected the petitioner's contention that because the statute was held unconstitutional in *Sequoia Books I*, the permanent injunction was transparently invalid because it was directed against speech. The court instead applied the collateral bar rule of *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Under that rule, a court order must be obeyed in the face of a contempt citation, absent transparent invalidity of the order or lack of subject matter jurisdiction in the contempt action.

In *Sequoia Books II*, the Appellate Court specifically rejected the argued contrary authority of *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir., *en banc* 1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)). The Appellate Court reasoned that because the subject of the restraint was obscenity, the order was not transparently invalid and therefore sanctions for being found in violation were appropriate and the collateral bar rule should apply.

Sequoia Books' timely filed petition for rehearing was denied by the court on August 29, 1988. Petitioner

sought review in the Illinois Supreme Court, which on December 8, 1988 denied the petition for leave to appeal. On January 3, 1989, the Illinois Supreme Court stayed the mandate in this cause pending this Court's action on a petition for certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS APPELLATE COURT'S OPINION IN SEQUOIA BOOKS II, APPLYING THE "COLLATERAL BAR RULE" IN THIS FIRST AMENDMENT SETTING CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST CIRCUIT.

The petitioner, Sequoia Books, Inc., has been found in criminal contempt and fined $10,000 for violating an order which prohibited it from selling or exhibiting sexually explicit materials in violation of the Illinois Obscenity Statute, Chapter 38, Section 11-20 Ill.Rev.Stat. (1987). The trial court's authority for issuing the court order emanated from the Illinois Criminal Public Nuisance Act, Chapter 38, Section 37-1 *et seq.*, Ill.Rev.Stat. (1987). But for amendments to that act by the Illinois General Assembly, effective January 1, 1986, the Illinois trial court would have lacked subject matter jurisdiction to issue the contested order.

As a general rule, of course, court orders, even unlawful ones, are to be obeyed. It is the duty of the citizen, who is the subject of the court order, to seek a stay of its effect and appellate review of its substance and to comply with the order, in the absence of special circumstances, pending that further review. This is the essence

of the collateral bar rule as announced by this court. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The "special circumstances" that form the general exception to the *Walker* rule are in reality, two-fold. If the state court lacked subject matter jurisdiction, then the invalidity of the order, predicated upon that lack of jurisdiction, would be a defense in any subsequent contempt action. Alternatively, if the injunction order is "transparently invalid", a success on the attack of the validity of the order would prevent imposition of sanctions for violation of that invalid order. See *Walker*, 388 U.S. at 315.

Whether or not petitioner has been punished for the alleged violation of an invalid court order is thus a central issue in the contempt action. *Donovan v. City of Dallas*, 377 U.S. 408, 414 (1964). If the sole basis for the state court's jurisdiction is an unconstitutional statute, the unconstitutionality of that statute should operate as a bar to contempt sanctions for an unconstitutional statute is not a law, and as such the invalid statute confers no rights, and imposes no duties or responsibilities by its terms. *Norton v. County of Shelby*, 118 U.S. 425, 442 (1886).

A state court order may be described as "transparently invalid" if an argument to sustain it would be totally lacking in merit or otherwise patently frivolous. In *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir., *en banc* 1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)), the court of appeals held that the "collateral bar" rule does not apply to a transparently invalid court order. There, a trial court had temporarily enjoined the publisher of a newspaper from disseminating information about a defendant

in a criminal case. The newspaper did not seek appellate review and instead, published in the face of the court order which proscribed the contrary. The Court of Appeals found that the order in question imposed an invalid prior restraint and thus was patently unconstitutional and transparently invalid within the meaning of *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The court noted a specific distinction between pure speech and speech involving conduct. *Matter of Providence Journal Company*, 820 F.2d at 1348.

The First Circuit's conclusion that the order in question there was transparently invalid placed solid reliance on the decisions of this court in *Near v. Minnesota*, 283 U.S. 697 (1931), *New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976). This court has never upheld a prior restraint on pure speech. See *Matter of Providence Journal Company*, 820 F.2d at 1348-1349. Indeed, the constitutional merits of the prior restraint issue is again pending before this Court. See *Fort Wayne Books v. Indiana*, review granted — U.S. —, 108 S.Ct. 1106 (March 7, 1988), argued 57 U.S.L.W. 3278 (U.S., No. 87-470 October 3, 1988).

Additionally, the *en banc* opinion modifying the original opinion in *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)), suggested that for the collateral bar rule to not apply ordinarily, the criminal contemner should seek a stay and appellate review of the court order. The Fifth Circuit had reached the same conclusion.

In *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), the court upheld a conviction for criminal con-

tempt against two newspaper reporters. The writers had written articles for their respective papers summarizing testimony presented in court, in violation of a court order. The Fifth Circuit determined that the "gag" order violated the First Amendment, but held that the two reporters had refused to obey the order without testing its validity through established appellate procedures. The Court commented:

> [T]he rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must not require an irretrievable surrender of constitutional guarantees.
>
> *Id.* 465 F.2d at 511.

Certainly, petitioner complied with the *Dickinson* components in continuously asserting the invalidity of the nuisance statute and injunctive order through appropriate appellate processes. To sanction petitioner for contempt in this First Amendment setting is to require "irretrievable surrender" of its right to free speech.

The Second District Appellate Court's ruling in *Sequoia Books II* under scrutiny here is in conflict with this court's decisions on the issue of prior restraint, this court's decisions on the jurisdictional power of a court under an unconstitutional statute, and decisions of the First and Fifth Circuit in *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir., *en banc*

1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)) and *Dickinson*, respectively, on the application of the collateral bar rule.

The underlying statute, the Illinois Criminal Public Nuisance Act, is patently unconstitutional. Indeed, another panel of the Second District Appellate Court, in *Sequoia Books I*, clearly and unequivocally struck the act down as unconstitutional, insofar as it authorized injunctions against adult bookstores that sell sexually explicit materials. In reaching its conclusion, the court in *Sequoia Books I* broke no new ground and merely followed the fundamental principles set forth by this court in *Near v. Minnesota*, 283 U.S. 697 (1931) and its progeny.

The panel's opinion in *Sequoia Books II* sought to distinguish the opinion in *Sequoia Books I* by saying that since the subject matter of the order was obscenity, and obscenity is not protected under the constitution, the collateral bar rule announced in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), would apply. It is interesting to note that the panel's opinion in *Sequoia Books II*, in this regard, directly contradicted the opinion in *Sequoia Books I* on this issue. *Sequoia Books I* stated:

> "There is little question that the order which enjoins the defendants from selling or exhibiting explicit material at the Denmark II bookstore for one year acts as a prior restraint on its First Amendment rights. On the basis of past violations, the court enjoined defendants from future sales of sexually explicit materials whether or not they were actually obscene. This is prior restraint in one of its purest forms."
>
> *Sequoia Books I*, 165 Ill.App.3d 143 at 146, 518 N.E.2d 775 at 778.

Under this court's holdings in *Miller v. California*, 413 U.S. 15 (1973) and *Jenkins v. Georgia*, 418 U.S. 153 (1974), it is clear that sexually explicit material enjoys constitutional protection and is presumed protected until and unless a proper judicial application of the constitutional test for obscenity has occurred. Where, as here, the trial court's order enjoined the sale or exhibition of unnamed materials in the future, there was imposed an invalid prior restraint. See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

There is nothing surprising nor uniquely creative about the argument that future speech in its pure form as speech—as opposed to conduct—may not be constitutionally enjoined. This court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931), is recognized as a cornerstone of First Amendment jurisprudence. Petitioner sought refuge in the prior restraint analysis predicated on *Near* and the guidelines for systems of prior restraint set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), in its initial response to the complaint which sought preliminary and permanent injunctive relief against it. The fact that petitioner has steadfastly maintained that both the statute which purported to give the trial court jurisdiction and the order issued by the trial court, violated its rights under the First Amendment, throughout the entire course of this litigation points out the most significant conflict with the First Circuit decision in *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir. *en banc* 1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)).

Petitioner not only raised its constitutional claims at the earliest opportunity, it persisted in those constitu-

tional claims and made good faith attempts at appellate advocacy on the merits and in seeking stays from the effect of the injunctive orders. At the Illinois Appellate Court level, the Illinois Supreme Court level, and on two occasions before this court, petitioner sought stays to ameliorate the chilling effect of the injunctive orders arguing that they impose an invalid system of prior restraint against the operation of its bookstore.

All efforts at seeking stays were unsuccessful but no one can contest the good faith effort set forth to adhere to and respect the court order entered against it, under the arguable jurisdiction of the circuit court. What petitioner was contesting throughout this process was that the Circuit Court of Kendall County lacked subject matter jurisdiction in this litigation and that as a result, any order which sought to impose an injunction, amounted to a prior restraint that was invalid, and was void *ab initio*. Petitioner certainly had the right to also rely on the existing precedent from this Court that demonstrated that the statute was patently unconstitutional and that the order issued on the statute was patently frivolous and transparently invalid.

The only alternative available to petitioner was to close its doors, an exercise in self-censorship that would have represented a total abdication of its First Amendment rights. Certainly a litigant may respectfully contest issues of a constitutional magnitude without surrendering the constitutional rights that form the core of that litigation. The court has recognized that principle in the setting of the Fifth Amendment, *Maness v. Myers*, 419 U.S. 449 (1975), and should do the same in the setting of the First Amendment.

The relinquishment of First Amendment rights by petitioner in the face of the invalid court order in this case was harm of an irreparable nature which certainly distinguished the present case from *Walker v. City of Birmingham*, 388 U.S. 307 (1967). This Court should address the conflict of decisions between *Sequoia Books II* and decisions of this Court and the First Circuit Court of Appeals, as well as the inherent conflict between *Sequoia Books II* and *Sequoia Books I*. This Court has never permitted nor ratified prior restraint on speech, under the circumstances of this case. Because of the First Amendment principles involved, the Federal Court-State Court conflict has enhanced significance of constitutional magnitude. In *United States v. Providence Journal Co.*, — U.S. —, 108 S.Ct. 65 (1987), the Court exercised certiorari jurisdiction to address the important issue raised in this case. After briefing and argument, the Court concluded certiorari had been improvidently granted, based on reasons other than the merits, and dismissed the petition. *United States v. Providence Journal Co.*, — U.S. —, 108 S.Ct. 1502 (1988).

The Second District Appellate Court in its opinion in *Sequoia Books II* ignores this Court's condemnation of prior restraint and elevates form over substance in suggesting that petitioner must blindly adhere to the invalid permanent injunction even though it engaged in good faith appellate advocacy while seeking to continue to exercise its First Amendment rights by disseminating sexually explicit materials. The permanent injunction order by its very nature was vague and impossible to comply with. Under these circumstances, the application of the collateral

bar rule in and of itself perpetuates a system of prior restraint.

———o———

CONCLUSION

Because of the conflicts between decisions of this Court in *Near v. Minnesota*, 283 U.S. 697 (1931) and its related decisions, and the decision of the First Circuit Court of Appeals in *Matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (mod. 820 F.2d 1354 (1st Cir., *en banc* 1987) cert. dismissed — U.S. —, 108 S.Ct. 1502 (1988)), this Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District. The conflict in decisions further demonstrates the conflict between fundamental First Amendment principles against prior restraint and a collateral bar rule. It is respectfully submitted that significant issues are presented under the First and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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APPENDIX

EXHIBIT A

172 Ill.App.3d 627
527 N.E.2d 50

The PEOPLE of the State of Illinois,

Plaintiff-Appellee,

v.

SEQUOIA BOOKS, INC.,

Defendant-Appellant.

No. 2-87-0675.

Appellate Court of Ilinois,
Second District.

July 21, 1988.

Rehearing Denied Aug. 22, 1988.

Justice INGLIS delivered the opinion of the court:

This is an appeal from a jury verdict finding defendant in violation of a permanent injunction which enjoined defendant, Sequoia Books, Inc., from, among other things, violating section 11-20 of the Criminal Code of 1961 (Ill. Rev.Stat.1985, ch. 38, par. 11-20). We affirm.

On appeal, defendant contends (1) that the finding of contempt cannot stand due to the fact that the injunction of which it was based was reversed as a prior restraint; (2) that a statement by an expert witness that the two magazines at issue promoted AIDS was reversible error; (3) that it was reversible error for the trial court to *sua sponte* state that "the corporation is responsible for acts of its agents"; and (4) that the imposition of a $10,000 fine was an abuse of discretion.

On January 21, 1987, an injunction was entered against defendant and Bruce and Cathy Riemenschneider which provided:

"1. That this Court hereby enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns, from maintaining the public nuisance as described in the findings hereinabove and further expressly enjoins the defendant, Sequoia Books, Inc., its agents, employees and assigns from exhibiting, selling or offering for sale material in the premises described above in violation of Chapter 38, § 11-20 Illinois Revised Statutes.

2. That the defendants, Sequoia Books, Inc., Bruce and Cathy Riemenschneider are restrained from maintaining or permitting such nuisance and from using the building described hereinabove for a period of one (1) year hereafter providing that upon the defendants giving Bond to the Clerk of this Court to be approved by this Court in an amount of $5000.00 payable to the People of the State of Illinois and including a condition that no offense specified in § 37-1 of Chapter 38, Illinois Revised Statutes, shall be committed at, in or upon the property described and that the principal obligor and surety assume responsibility for any fine, costs or damages resulting from such an offense hereafter that then and upon the filing of said Bond the defendants may use the building as described."

The proceedings leading up to this injunction are more fully described in *People v. Sequoia Books, Inc.* (1988), 165 Ill.App.3d 143, 116 Ill.Dec. 153, 518 N.E.2d 775.

Defendant posted the 5,000 bond as required by the January 21, 1987, order. The State later moved to revoke the bond and vacate any stay of enforcement of the trial court's January 21, 1987, order. This court remanded for a factual hearing (which was held in the trial court on April 29, 1987), and on May 4, 1987, Judge Burnell entered an order finding that on March 4 and 5, 1987, Sequoia had sold obscene magazines at the business premises and had therefore violated the conditions of the bond. On

May 11, 1987, over the objections of defendant, this court entered an order revoking the appeal bond and dissolving the stay of the injunctive order. On May 29, 1987, the Illinois Supreme Court denied defendant's request for a supervisory order to impose a stay.

On May 26, 1987, a rule to show cause was filed charging defendant and the Riemenschneiders with contempt of court on the basis of the magazines purchased by Robert Wenman.

On June 15 and 16, 1987, a jury trial was held to determine if the injunctive order had been violated. We note here that, although the rule to show cause was filed against both defendant and the Riemenschneiders, it appears from the record that the State only proceeded against defendant at trial and a judgment of contempt was entered only against defendant. At trial, Robert Wenman, Jr., a deputy for the Kendall County sheriff's office, testified that on May 11, 1987, he entered the Denmark Bookstore. He purchased two magazines, Leather Sleaze and Hard Leather.

Deputy Wenman testified as to the magazines he purchased on May 11. He identified the two magazines which were purchased from the bookstore, the magazines were admitted into evidence and shown to the jury over defendant's objection about the constitutionality of the court's underlying injunctive order.

The next witness for the State was Dr. Michael Chiappetta, a registered psychologist and certified social worker practicing in Elgin, Illinois. Dr. Chiappetta testified that he was a treating psychologist. He testified that in his opinion the word prurient meant "that which appeals to the morbid, the disturbed, the sick, the pathological as-

pects of it." He was asked by the State if he had an opinion based upon a reasonable degree of psychological certainty, as to whether or not a reasonable person would find these magazines have any serious scientific value, and he replied yes. He was asked by the State, over objection, whether the materials had any educational value and he replied "It would have absolutely no scientific value, and in my clinical opinion, would in fact give harmful educational input." The last question the prosecutor asked was as follows:

> "Q. To a reasonable degree of psychological certainty, do you have any other concern about material depicted in those magazines?
>
> A. Yes, I do.
>
> MR. ZOPF: I object. There is no reasonable degree of psychological certainty.
>
> THE COURT: Overruled.
>
> BY MS. FLETCHER: What would that be?
>
> A. That, they, the materials, what's presented here, tends to promote AIDS.
>
> MS. FLETCHER: I have no further questions.
>
> MR. ZOPF: Judge, I'm going to object. I ask to approach the bench.
>
> THE COURT: We better get this in chambers so we can make a record of it."

In chambers a motion for a mistrial was made by defendant because of the immaterial nature of the comment by Dr. Chiappetta, the prejudicial impact on the jury, the speculative nature of the comment and the lack of any

medical support for the doctor's opinion that the materials on trial promoted AIDS. The motion was denied by the court.

The next witness for the State was Alan Jiranek, a self-employed artist. He testified that the materials on trial had no artistic value.

The third witness, Jeanette Page, testified by way of stipulation, that she was an English teacher at Thompson Junior High School. It was stipulated that she would testify that the materials on trial did not in her opinion have any serious literary value.

Over defendant's objection, the jury was given an excised copy of the injunctive order which was the subject of the allegation of contempt.

After the State rested, defendant presented no evidence. Defendant made a motion for a directed verdict asserting, *inter alia*, that the underlying order of the alleged contempt was unconstitutional as a prior restraint and that there was insufficient evidence of *scienter*. Those motions were denied. Closing arguments were then presented to the jury. During the argument of defense counsel an objection was made to the statement that the State had failed to prove a willful violation. The court sustained the objection and in its ruling stated that "[t]he corporation is responsible for the acts of his agent."

The jury returned a verdict of guilty of contempt. The court summarily fined defendant $10,000 plus costs.

In its motion for a new trial, defendant again asserted the unconstitutionality of the Illinois criminal public nuisance statute, section 37-1 (Ill.Rev.Stat.1985, ch. 38, par.

37-1), that the court erred allowing the psychologist Michael Chiappetta to testify that the materials promoted AIDS, that the court erred in its ruling during defendant's closing argument that the State was not required to show *scienter*, and that the fine of $10,000 for two magazines was excessive. That motion for a new trial was denied.

I

In *People v. Sequoia Books, Inc.* (1988), 165 Ill.App.3d 143, 153, 116 Ill.Dec. 153, 518 N.E.2d 775, this court held that section 37-1 of the Criminal Code of 1961 (Code) (Ill.Rev.Stat.1985, ch. 38, par. 37-1) was unconstitutional in its application to adult bookstores that sell sexually explicit materials, and for that reason reversed the underlying injunction in the present case. The question now before this court is whether violation of that invalid injunction is grounds for contempt.

Defendant argues that a judgment of contempt cannot stand when based on an unconstitutional injunction. The State, on the other hand, argues that under *Walker v. City of Birmingham* (1967), 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210, an injunction, even though unconstitutional, may be the basis for a finding of criminal contempt.

In *Walker*, petitioners had violated a court order enjoining them from encouraging mass street parades or mass processions without a permit as required by a Birmingham ordinance. (388 U.S. at 309, 87 S.Ct. at 1826, 18 L.Ed.2d at 1213.) Without addressing the constitutionality of the injunction, the Court affirmed the fine

which had been entered against petitioner. (388 U.S. at 321, 87 S.Ct. at 1832, 18 L.Ed.2d at 1220.) In affirming, the Court quoted its earlier decision in *Howat v. Kansas* (1922), 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed 550:

> "'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'" (*Walker*, 388 U.S. at 314, 87 S.Ct. at 1828, 18 L.Ed.2d at 1216, quoting *Howat*, 258 U.S. at 189-190, 42 S.Ct. at 280, 66 L.Ed. at 559.)

The Court went on to state that "[w]hatever the limits of *Howat v. State of Kansas*, we cannot accept the petitioners' contentions in the circumstances of this case." 388 U.S. at 315, 87 S.Ct. at 1829, 18 L.Ed.2d at 1216.

The court noted:

> "[T]his is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity. We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. [Citations.] * * * As the Court stated, in *Cox v. Louisiana*, 'We emphatically reject the notion * * * that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by

> conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.'" 388 U.S. at 315-16, 87 S.Ct. at 1829, 18 L.Ed.2d at 1217, quoting *Cox v. Louisiana* (1965), 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, 484.

In *Cooper v. Rockford Newspaper, Inc.* (1977), 50 Ill.App.3d 250, 8 Ill.Dec. 508, 365 N.E.2d 746, this court reversed a judgment of contempt for violation of an injunction which enjoined a paper from editorializing about a libel suit in which the paper was involved. The court found that on balance, the competing interests of a free press on the one hand and a fair trial and the integrity of the court on the other, the defendant should not be held responsible for violating the injunction. 50 Ill.App.3d at 256-57, 8 Ill.Dec. 508, 365 N.E.2d 746.

In reaching its holding, this court looked to the Supreme Court's decision in *Maness v. Meyers* (1975), 419 U.S. 449, 461, 95 S.Ct. 584, 592, 42 L.Ed.2d 574, 584, and the Court's recognition that "where the injury flowing from an error is irreparable and the constitutional right involved is one with 'ancient roots' strongly implanted in the adversary system, the violation may not be punishable by contempt if the order is proved invalid." 50 Ill. App.3d at 254, 8 Ill.Dec. 508, 365 N.E.2d 746.

This court stated:

> "[T]he heavy presumption against such prior restraints on pure speech must be heavily weighed and deprivation of strongly rooted first amendment rights deemed an irreparable injury, to be permitted, if at all, when the competing interests are overriding." 50 Ill.App.3d at 256, 8 Ill.Dec. 508, 365 N.E.2d 746.

The court also stated that contempt was generally defined as conduct calculated to embarrass, hinder or obstruct a court. (50 Ill.App.3d at 255, 8 Ill.Dec. 508, 365 N.E.2d 746.) The court found that there was no hindrance of the court in that case. (50 Ill.App.3d at 255, 8 Ill.Dec. 508, 365 N.E.2d 746.) Finally, this court distinguished *Walker* because it did not involve a prior restraint on pure speech. 50 Ill.App.3d at 257, 8 Ill.Dec. 508, 365 N.E.2d 746.

In re Providence Journal Co. (1st Cir. 1986), 820 F.2d 1342, *modified* (1st Cir. 1987), 820 F.2d 1354, is also instructive on the issue before the court. In *Providence Journal*, the court stated that it was presented with the conflict between the first amendment principle that the press shall not be subjected to prior restraints and "the sine qua non of orderly government, that, until modified or vacated, a court order must be obeyed." 820 F.2d at 1344.

In *Providence Journal*, a temporary restraining order had been entered barring the Journal from publishing logs and memoranda that the FBI compiled from surveillance of an individual who was reputedly prominent in organized crime. (820 F.2d 1344-45.) The district court later vacated the order and denied a preliminary injunction. (820 F.2d at 1345.) However, prior to vacation of the order, the Journal published an article which contained information taken from the logs and memoranda. 820 F.2d at 1345.

After a hearing, the Journal was found guilty of criminal contempt. (820 F.2d at 1345.) The circuit court reversed the district court's contempt finding. (820 F.2d at 1353.) Like *Cooper*, *Providence Journal* distinguished

Walker. (See 820 F.2d 1346-47.) The court found that because the injunction in question enjoined pure speech, it was transparently invalid and therefore could not stand as the basis for a contempt citation. See 820 F.2d at 1353.

The import of *Walker* is that a contempt finding may stand even though it is based on an unconstitutional injunction. However, even *Walker* indicated that an injunction which was transparently void may not be grounds for a contempt finding. See *Walker*, 388 U.S. at 315, 87 S.Ct. at 1829, 18 L.Ed.2d at 1217; *Providence Journal*, 820 F.2d at 1347.

Furthermore, this court's opinion in *Cooper* indicates that a court order which enjoins pure speech cannot be the basis for contempt. (See *Cooper*, 50 Ill.App.3d at 257, 8 Ill.Dec. 508, 365 N.E.2d 746; see also *Providence Journal*, 820 F.2d at 1353.) Yet, at the same time, the necessity to protect the rightful power of the courts requires that if an order has any pretense to validity, it should be the basis for a contempt finding. (*Providence Journal*, 820 F.2d at 1347.) Thus, the determination of whether the injunction in the present case can support a contempt finding rests on whether the injunction was transparently invalid.

Prior restraints on speech and publication are the most serious and least tolerable infringement on first amendment rights. (*Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683, 697.) However, not all restraints on publication amount to an impermissible infringement on first amendment rights. (See *Kingsley Books, Inc. v. Brown* (1957), 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469.) "The phrase

'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." 354 U.S. at 441, 77 S.Ct. at 1328, 1 L.Ed.2d at 1474; see also *Southeastern Promotions, Ltd. v. Conrad* (1975), 420 U.S. 546, 558, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448, 459 (prior restraints are not unconstitutional *per se*).

[1] We find that in the instant case, the contempt finding was valid because paragraph one of the injunction enjoined defendant from violating section 11-20 of the Code or, in other words, from distributing obscenity, and obscenity is not within the area of constitutionally protected speech or press (*Roth v. United States* (1957), 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498, 1507).

In *Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697, 706, 51 S.Ct. 625, 627, 75 L.Ed. 1357, 1362, the Court held unconstitutional an injunction which enjoined the defendants from " 'producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law,' and also 'from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title.' " However, in so holding the Court stated:

> "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraints is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could

> regard them as protected by any constitutional right.' [Citation.] No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Emphasis added.) (283 U.S. at 715-16, 51 S.Ct. at 631, 75 L.Ed. at 1367.)

Thus under *Near*, the Court was of the opinion that prior restraints against obscene publications were constitutionally valid.

This position was reenforced in *Kingsley*, where the Court found that an injunction against distribution of booklets already found to be obscene was constitutional. *Kingsley*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469.

On the same day that the Court decided *Kingsley*, the Court decided *Roth v. United States* and its companion case *Alberts v. California* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. In *Kingsley*, the Court compared the legal consequences presented in that case with those found in *Alberts*. The Court noted that in *Alberts* the defendant had been fined $500, sentenced to 60 days in prison, and put on probation for two years on the condition that he not violate the obscenity statute. (*Kingsley*, 354 U.S. at 444, 77 S.Ct. at 1329, 1 L.Ed.2d at 1475.) In making this comparison the Court appears to have tacitly approved the conditional probation given in *Alberts*. In the instant case, paragraph one of the injunction does not differ from the conditional probation in *Alberts*. Consequently, under *Kingsley*, paragraph one of the injunction is appropriate.

We also note the Court's decision in *Vance v. Universal Amusement Co.* (1980), 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413. There, the Court affirmed a circuit court decision which held that two Texas nuisance statutes (Tex. Rev.Civ.Stat.Ann. arts. 4666, 4667(a) (Vernon 1952 & Supp.1978)) constituted prior restraints on the exercise of first amendment rights. In reaching its ruling the court stated:

> "[T]he regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and (b) that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." (445 U.S. at 315, 100 S.Ct. at 1161, 63 L.Ed.2d at 420.)

The Court further noted:

> "As the District Court and the Court of Appeals construed Art. 4667(a), when coupled with the Texas Rules of Civil Procedure, it authorizes prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene. Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution." 445 U.S. at 316, 100 S.Ct. at 1161-62, 63 L.Ed.2d at 420-21.

The same concern that was voiced in *Vance*, being in contempt for distribution of nonobscene materials, does

not present itself in the instant case. Paragraph one of the injunction in the instant case enjoins the sale or offering for sale of material described in section 11-20 of the Code (Ill.Rev.Stat.1985, ch. 38, par. 11-20). Consequently, it only enjoins the sale or offer for sale of obscene material. Thus, under paragraph one of the injunction, defendants would not be subject to contempt for the sale of nonobscene material, and, in fact, the instructions in the present case required the jury to find that either of the two magazines was obscene. The concern expressed by the Court in *Vance* is therefore not present in the case now before us.

In accordance with the foregoing analysis, we find that constitutional guarantees of the first amendment do not require that the contempt finding be reversed in the instant case.

We note that we do not perceive conflict between this decision and this court's earlier decision reversing the injunction. The earlier decision finding section 37-1 *et seq.* of the Code unconstitutional and reversing the injunction, was focusing on paragraph two of the injunction, as is evidenced by the court's reference to the order's one-year period; the one-year period being mentioned only in paragraph two of the injunction. Paragraph two enjoins the use of the building for one year. Hence, if defendant had not posted bond, it would have been in violation of the injunction even for the sale of nonobscene material. Consequently, paragraph two was a prior restraint on free speech.

Finally, we address the way in which we have severed the two portions of the injunction for purposes of the

above analysis. The respect with which court orders must be accorded requires that the exception found in *Cooper* and *Providence Journal* be very narrowly applied such that if a portion of an injunction is constitutionally valid and it is that portion which is violated a contempt finding should stand. We are therefore of the opinion that the distinction that we draw between the two paragraphs is proper.

II

Defendant next contends that the trial court committed reversible error when it permitted the State to elicit testimony that the two magazines at issue promoted the spread of AIDS. Defendant argues that such testimony was error because it was outside of the witness' expertise and because it was not probative. Defendant further argues that it was reversible error because of the fear which is generated by the mention of AIDS. In response, the State argues that the witness's reference to AIDS was not improper because (1) he was correct; (2) as a psychologist he could testify as an expert the material promotes the type of sexual behavior depicted which in turn increases the likelihood of the transmission of AIDS; and (3) the testimony concerning AIDS is relevant to the scientific value of the magazines. The State further argues that even if it were error to allow the testimony, such error is not grounds for reversal since such testimony did nothing more than vocalize a concern that would have been present in the minds of the jurors and that the reference was brief and isolated.

[2-4] Whether an expert is qualified to testify is within the sound discretion of the trial court, and its decision will not be overturned absent an abuse of discre-

tion. (See *Hardware State Bank v. Cotner* (1973), 55 Ill.2d 240, 250, 302 N.E.2d 257.) In the instant case, Dr. Chiappetta testified that he was a registered psychologist who had studied in the area of sexual psychology and human beings and had engaged in analysis of sexual behavior. With these credentials, we find that it was within Dr. Chiappetta's expertise to testify that the materials in question promote certain types of sexual behavior and that such behavior is conducive to the spread of AIDS. Therefore, we find that Dr. Chiappetta was not testifying outside his field of expertise. However, we find that such testimony was irrelevant to the issue of obscenity.

Determination of relevancy is largely within the discretion of the trial court, and the trial court's decision will not be reversed absent an abuse of discretion. (*Carlyle v. Jaskiewicz* (1984), 124 Ill.App.3d 487, 496, 79 Ill.Dec. 847, 464 N.E.2d 751.) In the instant case, Dr. Chiappetta's statement that the materials promote AIDS was neither probative nor relevant to a determination of whether the materials were obscene. (See Ill.Rev.Stat.1985, ch. 38, par. 11-20.) Therefore, we find that the trial court erred in allowing this testimony to stand.

Nevertheless, a reviewing court will not reverse a jury verdict because of error in admission of evidence where it is evident from the record that the outcome was not affected by the error. (*Greene v. Rogers* (1986), 147 Ill.App. 3d 1009, 1019, 101 Ill. Dec. 543, 498 N.E.2d 867.) After reviewing the record, we find that in the instant case, Dr. Chiappetta's statement that the materials at issue promoted AIDS would not have affected the outcome of the trial.

III

Defendant next contends that the trial court committed reversible error when it *sua sponte* orally instructed the jury. Defendant argues that the court's action deprived it of a fair trial because the instruction was incomplete and its effect was to create an absolute liability.

Illinois Pattern Jury Instructions, Criminal, No. 5.07 states:

> "A corporation is legally responsible for conduct which an agent of the corporation performs while acting within the scope of his office or employment and in behalf of the corporation.
>
> 'Agent' means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation." Illinois Pattern Jury Instructions, Criminal, No. 5.07 (2d ed. 1981) (hereinafter IPI Criminal 2d No. 5.07).

[5] In the instant case, the trial court during defense counsel's closing argument, stated "the corporation is responsible for the acts of his [sic] agent." Although this was error in that it was not a complete statement of IPI Criminal 2d No. 5.07, defendant fails to demonstrate how it was prejudicial. For example, defendant does not explain how a full instruction in accordance with IPI Criminal 2d No. 5.07 could have changed the outcome of the verdict. Consequently, we hold that the trial court did not commit reversible error in stating that a corporation is responsible for acts of its agents.

IV

[6, 7] Defendant's final contention is that the fine of $10,000 was excessive and an abuse of discretion. De-

fendant argues that the trial court was without authority to impose such a substantial fine.

Contrary to defendant's assertions, it has long been recognized that it is within the inherent power of the court to punish contempt. *In re G.B.* (1981), 88 Ill.2d 36, 41, 58 Ill.Dec. 845, 430 N.E.2d 1096.

Furthermore, section 1-3 of the Code provides:

> "No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or civil judgment." (Ill.Rev. Stat. 1985, ch. 38, par. 1-3.)

The fact that the same conduct was in violation of a criminal statute did not affect the power of the court to punish the conduct as contempt. See *People v. Rodriguez* (1980), 91 Ill.App.3d 626, 630, 47 Ill.Dec. 86, 414 N.E.2d 1202.

Finally, it does not appear that the amount of the fine was an abuse of discretion. The punishment to be imposed for contempt lies within the sound discretion of the court. *Hoga v. Clark* (1983), 113 Ill.App.3d 1050, 1062, 69 Ill.Dec. 736, 448 N.E.2d 196.

In the instant case, the injunction was predicated upon a prior violation of section 11-20 of the Code. Violation of the injunction was therefore in effect a subsequent violation of section 11-20 of the Code. A second offense of obscenity is a Class 4 felony (Ill.Rev.Stat.1985, ch. 38, par. 11-20(d)), which is punishable by a $10,000 fine (Ill.Rev.Stat.1985, ch. 38, par. 1005-9-1(a)(1)). Therefore, the contempt fine which was imposed was comparable

to a fine under section 11-20 of the Code and as such was not an abuse of discretion.

For the foregoing reasons, the contempt finding and the $10,000 fine are affirmed.

Affirmed.

LINDBERG, P.J., and DUNN, J., concur.

EXHIBIT B

(SEAL)
STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

Office of the Clerk
312/695-3750

Appellate Court Building
Elgin, Illinois
60120-5558

Appeal from the Circuit Court of County of Kendall
Trial Court Number: 86CH3

THE COURT HAS THIS DAY, 08/22/88, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-87-0675

People v. Sequoia Books, Inc.
Petition by Defendant-Appellant for rehearing denied.
(Inglis, Lindberg, Dunn, JJJ.)

LOREN J. STROTZ, Clerk

cc: Reno, O'Byrne & Kepley, P.C.
Michael J. Zopf
Glenn A. Stanko
Mr. J. Steven Beckett
Hon. Dallas C. Ingemunson
William L. Browers, Deputy Director
Marshall M. Stevens

EXHIBIT C

(Received Dec. 9, 1988)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 8, 1988

Mr. J. Steven Beckett
Beckett & Crewell
313 N. Mattis Ave., S#209
Champaign, IL 61821

No. 67734—People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 30, 1988.

EXHIBIT D

GENERAL NO. 67734

IN THE SUPREME COURT
OF THE
STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of the Second District,
Plaintiff-Appellee, Respondent,	No. 87-675
vs.	From the Circuit Court of the 16th Judicial Circuit Kendall County, Illinois
SEQUOIA BOOKS, INC.,	No. 86-CH-3
Defendant-Appellant, Petitioner,	Honorable Wilson Burnell, Judge Presiding

O R D E R

(Filed Jan. 3, 1989)

THIS MATTER coming on for consideration on the motion of petitioner to stay the mandate of this court pending an application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of an application for *certiorari* or the expiration of the period within which said application may be filed. If *certiorari* is applied for, and mandate of this court shall, upon proof of such filing being made by affidavit filed with the Clerk

of this Court, be further stayed pending resolution by the United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which *certiorari* may be sought.

EXHIBIT E

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT F

ARTICLE 37. PROPERTY FORFEITURE

Paragraph

37-1. Maintaining public nuisance.
37-2. Enforcement of lien upon public nuisance.
37-3. Revocation of licenses, permits and certificates.
37-4. Abatement of nuisance.
37-5. Enforcement by private persons.

Article 37 was added by Laws 1965, p. 403, eff. July 1, 1965.

37-1. Maintaining public nuisance

§ 37-1. Maintaining Public Nuisance.

§ 37-1. Maintaining Public Nuisance. Any building used in the commission of offenses prohibited by Sections 9-1, 10-1, 10-2, 11-14, 11-15, 11-16, 11-17, 11-20, 11-20.1, 11-21, 11-22, 12-15.1, 16-1, 20-2, 23-1, 23-1(a)(1), 24-1(a)(7), 24-3, 28-1, 28-3, 31-5 or 39A-1 of the "Criminal Code of 1961", approved July 28, 1961, as heretofore and hereafter amended, or prohibited by the "Illinois Controlled Substances Act",[1] or the "Cannabis Control Act" enacted by the 77th General Assembly, as heretofore and hereafter amended,[2] or used in the commission of an inchoate offense relative to any of the aforesaid principal offenses is a public nuisance.

(b)[3] Sentence. A person convicted of knowingly maintaining such a public nuisance commits a Class A misdemeanor. Each subsequent offense under this Section is a Class 4 felony.

Amended by P.A. 85-384, § 1, eff. Jan. 1, 1988.

[1]Chapter 56½, ¶ 1100 et seq.

[2]Chapter 56½, ¶ 701 et seq.

[3]No "(a)" in enrolled bill.

37-2. Enforcement of lien upon public nuisance

§ 37-2. Enforcement of lien upon public nuisance. Any building, used in the commission of an offense specified in Section 37-1 of this Act with the intentional, knowing, reckless or negligent permission of the owner thereof, or the agent of the owner managing the building, shall, together with the underlying real estate, all fixtures and other property used to commit such an offense, be subject to a lien and may be sold to pay any unsatisfied judgment that may be recovered and any unsatisfied fine that may be levied under any Section of this Article and to pay to any person not maintaining the nuisance his damages as a consequence of the nuisance; provided, that the lien herein created shall not affect the rights of any purchaser, mortgagee, judgment creditor or other lien holder arising prior to the filing of a notice of such lien in the office of the recorder of the county in which the real estate subject to the lien is located, or in the office of the registrar of titles of such county if that real estate is registered under "An Act concerning land titles" approved May 1, 1897, as amended;[1] which notice shall definitely describe the real estate and property involved, the nature and extent of the lien claimed, and the facts upon which the same is based. An action to enforce such lien may be commenced in any circuit court by the State's Attorney of the county of the nuisance or by the person suffering damages or both, except that a person seeking to recover

damages must pursue his remedy within 6 months after the damages are sustained or his cause of action becomes thereafter exclusively enforceable by the State's Attorney of the county of the nuisance.

Amended by P.A. 83-358, § 38, eff. Sept. 14, 1983.

[1]Chapter 30, ¶ 45 et seq.

37-3. Revocation of licenses, permits and certificates

§ 37-3. Revocation of Licenses, Permits and Certificates. All licenses, permits or certificates issued by the State of Illinois or any subdivision or political agency thereof authorizing the serving of food or liquor on any premises found to constitute a public nuisance as described in Section 37-1 shall be void and shall be revoked by the issuing authority; and no license, permit or certificate so revoked shall be reissued for such premises for a period of 60 days thereafter; nor shall any person convicted of knowingly maintaining such nuisance be reissued such license, permit or certificate for one year from his conviction. No license, permit or certificate shall be revoked pursuant to this Section without a full hearing conducted by the commission or agency which issued the license.

Added by Laws 1965, p. 403, eff. July 1, 1965.

37-4. Abatement of nuisance

§ 37-4. Abatement of nuisance. The Attorney General of this State or the State's Attorney of the county wherein the nuisance exists may commence an action to abate a public nuisance as described in Section 37-1 of this Act, in the name of the People of the State of Illinois, in the circuit court. Upon being satisfied by affidavits or

other sworn evidence that an alleged public nuisance exists, the court may without notice or bond enter a temporary restraining order or preliminary injunction to enjoin any defendant from maintaining such nuisance and may enter an order restraining any defendant from removing or interfering with all property used in connection with the public nuisance. If during the proceedings and hearings upon the merits, which shall be in the manner of "An Act in relation to places used for the purpose of using, keeping or selling controlled substances or cannabis", approved July 5, 1957,[1] the existence of the nuisance is established, and it is found that such nuisance was maintained with the intentional, knowing, reckless or negligent permission of the owner or the agent of the owner managing the building, the court shall enter an order restraining all persons from maintaining or permitting such nuisance and from using the building for a period of one year thereafter, except that an owner, lessee or other occupant thereof may use such place of the owner shall give bond with sufficient security or surety approved by the court, in an amount between $1,000 and $5,000 inclusive, payable to the People of the State of Illinois, and including a condition that no offense specified in Section 37-1 of this Act shall be committed at, in or upon the property described and a condition that the principal obligor and surety assume responsibility for any fine, costs or damages resulting from such an offense thereafter.

Amended by P.A. 83-342, § 3, eff. Sept. 14, 1983.

[1]Chapter 100½, ¶ 14 et seq.

37-5. Enforcement by private persons

§ 37.5. Enforcement by Private Persons. A private person may, after 30 days and within 90 days of giving the Attorney General and the State's Attorney of the county of nuisance written notice by certified or registered mail of the fact that a public nuisance as described in Section 37-1 of this Act, commence an action pursuant to Section 37-4 of this Act, provided that the Attorney General or the State's Attorney of the county of nuisance has not already commenced said action.

Added by Laws 1965, p. 403, eff. July 1, 1965.

EXHIBIT G

Ill.Rev.Stat. Ch. 38, ¶ 11-20 (1985)
(As revised effective 1/1/86)

11-20. *Obscenity*

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to

the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibit of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific values.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistics, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709 § 1, eff. Jan. 1, 1986.

EXHIBIT H

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

June 16, 1987

J. Steven Beckett, Esq.
Reno, O'Byrne & Kepley, P.C.
P.O. Box 693
Champaign, IL 61820

Re: Sequoia Books, Inc. v. Illinois
A-920

Dear Mr. Beckett:

Your application for stay of injunction was presented to Justice Stevens on June 13, 1987, who has endorsed thereon the following:

"Deny
John Paul Stevens
6/16/87"

Your check (no. 37909) has been enclosed. There is no fee for filing an application for stay of injunction.

Very truly yours,

JOSEPH F. SPANIOL, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

pk
Enc.

cc: Hon. Neil Hartigan, Attorney General
William Browers, Esq.
Dallas Ingemunson, Esq.

EXHIBIT I

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

SEQUOIA BOOKS, INC., *et al.*,

Defendants-Appellants.

Second District Nos. 2-87-0074, 2-87-0157 cons.
Orders reversed.

Opinion filed January 19, 1988.

JUSTICE WOODWARD delivered the opinion of the court:

Defendants, Sequoia Books, Inc. (Sequoia), and Bruce and Cathy Riemenschneider (Riemenschneiders), appeal from a permanent injunction issued by the circuit court of Kendall County which restrained them from using a building commonly known as "Denmark II" for one year.

On January 7, 1986, the Kendall County State's Attorney filed a complaint for injunction directed against Sequoia and Riemenschneiders under the new authority of section 37-1 of the Criminal Code of 1961 (Code) (Ill. Rev. Stat. 1985, ch. 38, par. 37-1 *et seq.*). The complaint asserted, in substance, that Sequoia operated the Denmark II Bookstore at a location on U.S. Route 30, in Kendall County, which was owned by Riemenschneiders, from which location Sequoia disseminated sexually explicit items which were obscene. The compalint further contended that Sequoia and its employees continued to sell materials, including magazines, despite criminal convictions for obscenity and jury determinations that magazines

sold at the store were obscene. Accordingly, the State prayed that the business location be declared a public nuisance and that the trial court issue prelinimary and permanent injunction for closing the building.

Sequoia responded with a motion to dismiss which, *inter alia*, contended that the amended statute was unconstitutional on its face because it permitted the imposition of an invalid prior restraint on future speech and because it did not contain the procedural safeguards of a system of prior restraint. At an initial hearing on the complaint, the trial court denied the motion to dismiss and indicated its belief that the Code was constitutional.

At the February 19, 1986, hearing and at a subsequent hearing held August 29, 1986, the trial court, by the testimony of witnesses and through judicial notice, heard a body of factual evidence about the ownership and operation of the Denmark II Bookstore. Since 1982 the location has been owned by the Riemenschneiders, who lease it to Sequoia for the operation of the bookstore. Sequoia operates an adult bookstore on the business premises which offers for sale sexually explicit magazines.

From 1982 to 1985, 40 criminal cases had been filed by the Kendall County State's Attorney against Sequoia or its employees, charging violation of the obscenity statute with respect to approximately 1,500 magazines. Twenty-six of those cases were dismissed by agreement based on a policy of the State's Attorney to not prosecute clerks who left the employment of the store. Three cases against clerks resulted in directed verdicts in the defendant's favor on the basis of failure of proof on the issue of *scienter*. Two cases were jury verdicts of not guilty in favor of defendants who were clerks, and one jury verdict

of not guilty was returned in favor of Sequoia. Two hundred thirty-three magazines had been charged in these cases. One jury verdict of guilty was returned against a fendant-clerk, and seven jury verdicts of guilty were returned against the corporate defendant. In those cases, 165 magazines were determined by the jury to be obscene, 40 magazines were determined to be not obscene, and no jury determination was obtained as to 255 magazines because they were withdrawn from consideration by the filing of amended charges.

In 1986 the Kendall County State's Attorney commenced four criminal actions against Sequoia and secured jury verdicts of guilty in each of the cases. Those verdicts included jury findings that 558 magazines were obscene and 13 magazines were not obscene.

On March 12, 1986, the trial court issued a preliminary injunction against Sequoia. The order was reduced to writing on March 14, 1986, and stated in part:

> "[T]his Court hereby enjoins the defendant Sequoia Books, Inc., its agents, employees and assigns from maintaining the public nuisance * * * and further expressly enjoins the defendant, Sequoia Books, Inc., its agents employees and assigns from exhibiting, selling or offering for sale materials in violation of Chapter 38, Section 11-20 Illinois Revised Statutes."

An attempted interlocutory appeal of this order was dismissed by this court on May 1, 1986, as being improperly perfected.

On July 25, 1986, the Kendall County State's Attorney filed a petition for rule to show cause against Sequoia alleging violation of the preliminary injunction order for the sale or offer of sale of obscene magazines on March

27 and 28, 1986, and May 9 and 29, 1986. Sequoia filed written objections in response on August 29, 1986, and contended that the preliminary injunction order was unconstitutional and the procedure being utilized imposed an invalid prior restraint.

On August 29, 1986, a hearing on the request for a permanent injunction was held. On January 7, 1987, the trial court orally pronounced its ruling that it would grant injunctive relief and order the building closed, but would stay the closure upon the posting of a bond:

> "I think that the injunction would be that they are enjoined from selling obscene magazines on the premises and that the premises should be closed for six months unless Sequoia or—and Riemenschneider give a bond that obscene magazines are not going to be sold from the premises and if they are, then they will—then judgment will be entered against them for that amount."

On January 21, 1987, the trial court entered a written order which enjoined Sequoia from maintaining a public nuisance in the Denmark II Bookstore location and expressly enjoined the exhibition, sale, or offer of sale of obscene materials from the premises. The written order also enjoined both Sequoia and Riemenschneiders from using the business premises for one year, provided that upon posting a bond in the amount of $5,000 and further conditioned upon no violation of offenses specified in section 37-1 of the Code, the building could be used.

Also on January 21, 1987, the trial court found that Sequoia had violated the preliminary injunction order of March 14, 1986, for the sale and offer of sale of magazines on May 9 and May 29, 1986. Finding Sequoia in contempt, the trial court imposed a fine of $500.

Sequoia posted the $5,000 bond as required by the January 21, 1987, order. While this appeal was pending, the People moved to revoke the bond and vacate any stay of enforcement of the trial court's January 21, 1987, order. This court remanded for a factual hearing, which was held in the trial court on April 29, 1987, and on May 4, 1987, the trial court entered an order finding that on March 4 and 5, 1987, Sequoia had sold obscene magazines at the business premises and had, therefore, violated the conditions of the bond. On May 11, 1987, over the objections of Sequoia, this court entered an order revoking the appeal bond and dissolving the stay of the injunctive order. On May 29, 1987, the Illinois Supreme Court denied Sequoia's request for a supervisory order to impose a stay.

There are two issues before this court; namely, does the injunction which was entered pursuant to the Code constitute a prior restraint and, if so, whether the Code provides sufficient "procedural safeguards designed to obviate the dangers of a censorship system." (*Freedman v. Maryland* (1965), 380 U.S. 51, 58, 13 L. Ed. 2d 649, 654, 85 S. Ct. 734, 739.) For purposes of this appeal, we do not need to address the issue raised by Riemenschneiders.

The Code which is central to this case reads in pertinent part:

> "Any building used in the commission of offenses prohibited by * * * or used in the commission of an inchoate offense relative to any of the aforesaid principal offenses is a public nuisance." (Ill.Rev.Stat. 1985, ch. 38, par. 37-1.)
>
> "Upon being satisfied by affidavits or other sworn evidence that an alleged public nuisance exists, the court may without notice or bond enter a temporary restraining order or preliminary injunction to

> enjoin any defendant from maintaining such nuisance and may enter an order restraining any defendant from removing or interfering with all property used in connection with the public nuisance. If during the proceedings and hearings upon the merits, * * * the existence of the nuisance is established, and it is found that such nuisance was maintained with the intentional, knowing, reckless or negligent permission of the owner or the agent of the owner managing the building, the court shall enter an order restraining all persons from maintaining or permitting such nuisance and from using the building for a period of one year thereafter * * *." Ill. Rev. Stat. 1985, ch. 38, par. 37-4.

It is well established that prior restraint upon speech is antithetical to the first amendment. (*Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625.) In *Near*, the court considered the validity of a Minnesota public nuisance statute. The statute defined as a public nuisance the possession or sale of an obscene or defamatory publication. The statute permitted injunctive relief against future publication and provided for abatement of the nuisance, along with criminal penalties. The defendant, who had been permanently enjoined from publishing his weekly newspaper, argued that the statute violated first amendment guarantees.

In analyzing the case before it, the *Near* court wrote as follows:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter * * * and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true

> and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship." (*Near*, 283 U.S. at 713, 75 L. Ed. at 1366, 51 S. Ct. at 630.)

The court later noted the following:

> "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near*, 283 U.S. at 720, 75 L. Ed. at 1369, 51 S. Ct. at 632.

In *Vance v. Universal Amusement Co.* (1980), 445 U.S. 308, 63 L. Ed. 2d 413, 100 S. Ct. 1156, the Supreme Court held that a Texas nuisance statute, when joined with a State rule of civil procedure, authorized prior restraints of indefinite duration on the exhibition of movies that have not been adjudicated to be obscene. The court found that an exhibitor would be required to obey such an order pending review of the merits and would be subjected to contempt proceedings even if the movie was not found to be obscene. In the court's view, these prior restraints were more burdensome and objectionable than the threat of criminal penalties after the film has been shown. See also *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (invalid to eliminate completely adult uses by application of a zoning ordinance); *Southeastern Promotions, Ltd. v. Conrad* (1975), 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (denial, suspension, or revocation of license unconstitutional).

•1 There is little question that the order which enjoins the defendants from selling or exhibiting explicit

material at the Denmark II Bookstore for one year acts as a prior restraint on its first amendment rights. On the basis of past violations, the court enjoined defendants from future sales of sexually explicit materials whether or not they were actually obscene. This is prior restraint in one of its purest forms.

The State argues that *Arcara v. Cloud Books, Inc.* (1986), 478 U.S. —, 92 L. Ed. 2d 568, 106 S. Ct. 3172, is dispositive in this case. In *Arcara*, the Supreme Court upheld the constitutionality of a New York statute which authorized the closure of a building found to be a public health hazard for up to one year. The complaint was based on proof of illegal sexual acts and solicitation for prostitution being conducted on the premises. The defendant bookstore asserted a prior restraint argument which the court rejected because illicit sexual *conduct* rather than *protected speech* was being enjoined.

Justice O'Connor, in a concurring opinion, explicated the distinction made by the court:

> "If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara*, 478 U.S. at —, 92 L. Ed. 2d at 579, 106 S. Ct. at 3178 (O'Connor, J., concurring).

It is obvious that the facts of *Arcara* distinguish it from the present case. Here we are not dealing with illegal sexual conduct but rather speech, which is presumptively protected. The New York statute regulated conduct that posed public health problems. The Illinois statute, as

applied here, is aimed at proscribing the sale and exhibition of allegedly obscene materials.

The State also argues that the propriety of the permanent injunction against the defendant's use of the building is supported by Illinois case law. We do not agree. None of the cases cited by the State deal conclusively with a permanent injunction entered against an adult bookstore solely for the sale of allegedly obscene materials. In *People v. Sequoia Books, Inc.* (1986), 149 Ill. App. 3d 383, the State filed a two-count complaint pursuant to section 1 *et seq.* of "An Act regarding places used for purposes of lewdness, assignation, or prostitution, to declare the same to be public nuisances, and to provide for the more effectual suppression thereof" (Ill. Rev. Stat. 1981, ch. 100½, par. 1 *et seq.*). Count I sought to enjoin defendants from the exhibition and sale of allegedly obscene materials and was premised upon said statute despite the fact that it could not be used to abate obscenity. (*People ex rel. Carey v. Starview Drive-In Theater* (1981), 100 Ill. App. 3d 624.) Count II sought to enjoin defendants from operating the Denmark Bookstore for one year because defendants allegedly permitted fellatio to occur within the business premises. This case is not on point.

The State further cites the following language in *Sequoia Books, Inc.* as support for the permanent injunction:

> "We note, however, that freedom of speech and press from prior restraint is not absolutely unlimited. [Citations.] There are legitimate State interests at stake in 'stemming the tide of commercialized obscenity' including the interest of the public in the quality of life, the total community environment, the tone of commerce in city centers, and perhaps public safety

itself. [Citation.]" *Sequoia Books, Inc.*, 149 Ill. App. 3d at 387-88.

This simply reiterates the long-established doctrine regarding restraint of speech and provides no new guidance for this court. In *Kingsley Books, Inc. v. Brown* (1957), 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, the court approved a system of prior restraint against *named publications*. This excerpt from *Sequoia Books, Inc.* reflects that well-established idea that prior restraints on speech are not unconstitutional *per se*. *Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631.

• 2 Regarding the second issue argued by defendants, prior restraints are not *per se* unconstitutional. (*Bantam Books*, 372 U.S. at 70, 9 L. Ed. 2d at 593, 83 S. Ct. at 639.) Nevertheless, any system of prior restraint "comes to this court bearing a heavy presumption against its constitutional validity." (*Bantam*, 372 U.S. at 70, 9 L. Ed. 2d at 593, 83 S. Ct. at 639.) A system of prior restraint can be found constitutional only if it provides adequate procedural safeguards. *Freedman v. Maryland* (1965), 380 U.S. 51, 58-60, 13 L. Ed. 2d 649, 654-55, 85 S. Ct. 734, 739-40.

> "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd.*, 420 U.S. at 560, 43 L. Ed. 2d at 460, 95 S. Ct. at 1247.

The court's basis for imposition of procedural safeguards is that "[t]he separation of legitimate from illegitimate speech calls for * * * sensitive tools." *Speiser v. Randall* (1958), 357 U.S. 513, 525, 2 L. Ed. 2d 1460, 1472, 78 S. Ct. 1332, 1342.

•3 The Code is not the "sensitive tool" prescribed by the Supreme Court. It is procedurally deficient in terms of the test put forward in *Freedman*. Specifically, the Code does not define the length of the period during which an alleged nuisance can be restrained prior to full judicial review. Also, it makes no provision for the prompt final determination of the matter. Absent these clearly defined procedural safeguards, the Code cannot support a system of prior restraint.

Further, in *Vance v. Universal Amusement Co.* (1980), 445 U.S. 308, 63 L. Ed. 2d 413, 100 S. Ct. 1156, the disputed Texas nuisance statute read as follows:

> " 'Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or

> permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.'" *Vance*, 445 U.S. at 310 n.1, 63 L. Ed. 2d at 416 n.1, 100 S. Ct. at 1158 n.1, quoting Tex. Rev. Civ. Stat. Ann., art. 4666 (Vernon 1952).

The defendant operated an indoor adults-only motion picture theater. The landlord gave defendant notice that the theater's lease would be terminated. The county attorney had informed the landlord that he would be attempting to enjoin the tenants from showing allegedly obscene movies. Defendant filed suit to obtain injunctive and declaratory relief to prevent any action under the Texas nuisance suit.

In analyzing the applicable standard of review, the Supreme Court noted that the court of appeals had correctly found that the regulation of communication such as the exhibition of motion pictures must utilize more narrowly drawn procedures than is required by the abatement of ordinary nuisance and that the State's burden when attempting to enjoin future exhibitions of said materials is heavier than the burden of supporting a criminal sanction for a past communication.

The court found that the Texas statute authorized prior restraints of indefinite duration on the exhibition of motion pictures that had not been adjudged obscene. The court then stated as follows:

> "Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is

> ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution." *Vance*, 445 U.S. at 316, 63 L. Ed. 2d at 421, 100 S. Ct. at 1161-62.

Vance is sufficiently similar to the instant case both in terms of the facts and the relevant nuisance statute to be controlling here. The Code, specifically section 37-4, suffers from the same procedural deficiencies found in the Texas statute that was declared an unconstitutional prior restraint on speech. Under the Code, the State can *ex parte* move the court to enter a temporary restraining order or preliminary injunction. The court can, upon being satisfied by affidavits or other sworn evidence, *without notice or bond* enter a temporary restraining order or preliminary injunction to enjoin the alleged nuisance. Presumably, the defendant must obey the order pending review of its merits or face contempt proceedings.

In *Vance* the court found these procedures to lack sufficient safeguards to pass constitutional muster. In the instant case, the procedural elements of section 37-4 of the Code are constitutionally deficient in safeguarding presumptively protected speech. The procedures authorize prior restraints that are more onerous than is permissible under the appropriate standard of review.

The State again argues that *Arcara v. Cloud Books, Inc.* (1986), 478 U.S. —, 92 L. Ed. 2d 568, 106 S. Ct. 3172, is dispositive regarding the issue of procedural safeguards. As noted above, *Arcara* deals with an alleged public health hazard rather than protected speech. As such, it is clearly distinguishable.

For the foregoing reasons, we hold that the Code (Ill. Rev. Stat. 1985, ch. 38, par. 37-1 *et seq.*) is unconstitutional in its application to adult bookstores that sell sexually explicit materials; therefore, we reverse the injunctive orders issued by the circuit court of Kendall County.

Reversed.

NASH and REINHARD, JJ., concur.

EXHIBIT J

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 14, 1988

Michael J. Zopf, Esquire
Reno, O'Byrne & Kepley, P.C.
501 West Church Street
P. O. Box 693
Champaign, IL 61820

Re: Sequoia Books, Inc. v. Illinois
A-516

Dear Mr. Zopf:

Your application for stay pending appeal in the above-entitled case has been presented to Justice Stevens, who has endorsed thereon the following:

"Deny
1/13/88
John Paul Stevens"

We are herewith returning your check in the amount of $200.00.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Edward L. Turner, Jr.
Assistant Clerk

kz
cc: Jack Donatelli, Assistant Attorney General
William Browers, Esquire
Dallas Ingemunson, Esquire